DIRKJE PIETERNELLA HALMA

v.

MOHD. NOOR BAHAROM & ORS.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
AJAIB SINGH SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-291 OF 1989]
4 JUNE 1990

TORT: *Damages - Dutch national injured while holidaying in Malaysia - Loss of future earnings - Alternative claim for loss of earning capacity - Plaintiff on no-pay leave at the time of accident - Whether entitled to loss of future earnings - Sections 28A(2)(c), (2)(d)(i) Civil Law Act 1956.*

The appellant (plaintiff) was a qualified registered nurse from Holland and was on a holiday tour when she was injured in an accident whilst on a visit to Malaysia. She was a healthy person aged 25 years at the time of the accident. She became an invalid as a result of the injuries sustained. She was on no-pay leave during her holiday and after completion thereof she was to continue her employment at the same hospital at the same salary.

Liability was admitted by the respondents. In the High Court, by consent, a sum of RM80,000 as general damages for pain and suffering and loss of amenities was awarded to the appellant. The respondent also agreed to a sum of RM55,880 being awarded as loss of earnings from the date of the accident until the date of trial. The issue on appeal was whether the appellant was entitled to claim for loss of future earnings under s. 28A(2)(c) of the Civil Law Act 1956 or alternatively to claim for loss of earning capacity.

Held:

[1] In awarding damages for loss of future earnings, only the amount that the appellant was receiving at the time she was injured can be taken into account.

[2] If the appellant was not receiving any earnings at that point of time, she does not qualify for any award for loss of future earnings.

[3] In this case, as the appellant was on no pay leave and was not receiving any earnings at the time of the accident, she is not entitled to any award for loss of future earnings.

[4] Since the amendment of the Civil Law Act 1984 on 1 October 1984, there is no distinction between pre-trial and post-trial loss of earnings and computation of loss of future earnings commences from the time when the plaintiff was injured.

[5] The order for a sum of RM55,880 awarded to the appellant as agreed loss of earnings from the date of the accident until the date of the trial should be cancelled.

[6] The appellant was entitled to be compensated for her loss of earning capacity as there was evidence that she was earning RM1,270 per month and there is also evidence that after the accident she was a vegetable and would have to be nursed for the rest of her working life.

[The award of RM55,880 as agreed loss of earnings to be cancelled. A sum of RM200,000 be awarded as loss of earning capacity.]

Cases referred to:
United Hokkien Cemetries Penang v. Majlis Perbendaharaan Pulau Pinang [1979] 2 MLJ 121
Dr. S. Underwood v. Ong Ah Long [1986] 2 MLJ 247
Yang Salbiah & Anor. v. Jamil bin Harun [1981] 1 MLJ 292
Jamil bin Harun v. Yang Kamsiah & Anor. [1984] 1 MLJ 217
Croke v. Wiseman [1981] 3 All ER 852
Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30
Tay Tong Chew & Anor. v. Abdul Rahman b. Haji Ahmad [1985] 1 MLJ 295
Sam Wan Hoon v. Kader Ibramshah [1981] 1 MLJ 295
Ong Hin Wah v. Dental Board Federation of Malaya [1953] 19 MLJ 248
Vandyk v. Minister of Pensions & National Insurance [1954] 2 All ER 723
Hoong Chin Wah v. Cheah Kum Swee & Anor. [1967] 1 MLJ 163
British Transport Commission v. Gourley [1956] AC 185
H. West & Son Ltd. v. Shephard [1963] 2 All ER 625
Philips v. South Western Railway Co. [1879] 4 QBD 406

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv), 8(1), 28A(2)(c), (2)(d)(i)
National Insurance Act 1946 [UK], s. 1(2)(a)

Other source referred to:
Halsbury's Laws of England 4th Edn., para. 873, Vol. 44

For the appellant - Gurbachan Singh & Kartar Singh; M/s. Bachan & Kartar
For the respondents - K.H. Ting; M/s. Othman Hashim & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

In this appeal the claim of one Dirkje Pieternella Halma, a Dutch national (the appellant) for loss of future earnings was on 6 July 1989, dismissed by the High Court at Ipoh on the ground that it was not proved that she was earning at the time she met with an accident in Malaysia on 24 October 1984. When the appeal was argued before us on 21 March 1990, the appellant filed a notice of motion for an order that she be allowed to amend her memorandum of appeal to include the following additional ground:

> The learned Judge erred in not allowing in the alternative a claim for loss of earning capacity.

We exercised our discretion to allow the new ground of appeal to be argued before us not only because a claim for "loss of future earning capacity" had been pleaded in the appellant's statement of claim but also because of the exceptional circumstances of this case.

The appellant was a qualified registered nurse looking after mentally retarded patients in Holland. She commenced her employment as such a nurse with effect from 1 October 1980, after having started studying to be a nurse from 1 August 1977. She continued working as such qualified nurse until 1 November 1983. She was in good health and was then 25 years old when she decided some time towards the fall of 1983 to see the world on a bicycle with her friend and colleague who was the second plaintiff in the Court below. The appellant took no pay leave for a period of two and a half years to enable her to go on her world tour. After completion of her world tour she was to continue her employment at the same hospital on the same salary.

The appellant commenced her overland tour through Europe towards Asia and cycled down into Malaysia through Thailand. She arrived in Malaysia on 21 October 1984, that is, a few days after the Civil Law (Amendment) Act 1984 (Act A602) came into force on 1 October 1984.

On 24 October 1984, at about 3.00 p.m. the appellant and her friend were cycling towards Ipoh near the 63rd milestone of the Ipoh/Butterworth road. She was travelling behind her friend in a single file when a bus belonging to the second respondent and driven by the first respondent knocked into the appellant and her friend. The appellant sustained very serious injuries including "spinal fracture with paralysis of the lower limbs, bladder and bowel functions". The above facts were not disputed and liability was admitted by the respondents. By consent a sum of RM80,000 as general damages for pain and suffering and loss of amenities was awarded to the appellant. The respondents also agreed to a sum of RM55,880 being awarded to the appellant as agreed loss of earnings from the date of accident until the date of trial. During the hearing before us Mr. Gurbachan Singh, leading Counsel for the appellant, agreed with us that since the amendment of the Civil Law Act 1984, on 1 October 1984, there is no distinction between pre-trial and post-trial loss of earnings. He agreed that as from that date loss of future earnings should be awarded in relation to the time when the plaintiff was injured, that is, the date of accident or injury and a proper award for loss of future earnings made under s. 28A(2)(c) of the Civil Law Act 1956. In this case as the appellant was below the age of 30 years at the time when she was injured s. 28A(2)(d)(i) of the said Act therefore applies. But the issue before us and the High Court was whether on the undisputed facts of this case the appellant was entitled to prosecute a claim for loss of future earnings under s. 28A(2)(c) of the Civil Law Act 1956.

We considered that s. 28A(2)(c) of the Act should be construed as a whole and reproduce it hereunder:

> 28A(2) In assessing damages under this section:
>
> (a) ...
>
> (b) ...
>
> (c) in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;
>
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
>
> (iii) Any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

It was the contention of Counsel for the plaintiff that the learned Judge had erred in misconstruing the word "before" in subsection (i) above to mean "at". It was submitted that there is a world of difference between the meaning of the words "before" and "at" and that it cannot be seriously contended that the Legislature had chosen the word "before" when it actually meant "at". Counsel stated that the operative words are "receiving earnings" and "before he was injured" and submitted that the Court should adopt a purposive interpretation and not a strictly literal and narrow one. It was contended that it has been proved and admitted that the appellant was receiving earnings by her own labour before she was injured and that was why the respondents had consented to an award of pre-trial loss of earnings for five years. Counsel pointed out that the appellant was employed for four years and one

month prior to her taking no pay leave which he contended was merely absence from employment with permission and that her employment and service continued. It was also pointed out that the appellant would have continued her employment after her tour and it was contended that she was therefore not unemployed but merely on pay leave at the time of the accident on 24 October 1984. It was emphasised that no pay leave was merely absence with permission but that the employment or service subsists and that the word "before" must mean before or prior without a restriction of the time frame by implying "just before" or "immediately before" or "a day before".

As an example to illustrate the above point, Counsel asked us to consider the case of a teacher who has no eligibility for vacation leave. Assuming that the Hari Raya holidays fall on a Tuesday and Wednesday and that he took no pay leave on the intervening Monday to come to this country and met with an accident on that Monday whilst he was on "no pay leave", could it be reasonably and justly be said that since he was on no pay leave he was not receiving earnings before or at time of the accident to disentitle him from receiving a just claim? Counsel cited another example of a Government servant who takes "no pay leave" say for six months to prepare for an examination and whilst on such leave he meets with an accident. Does it mean that just because at the time of the accident he was not receiving a salary but was doing so before such no pay leave he would therefore receive no future loss of earnings at all? Counsel submitted that the word "before" must be construed by the Court according to the facts of each case.

Counsel for the plaintiff then submitted that if we were inclined to agree with the learned Judge that subsections (i) and (ii) of s. 28A(2)(c) must be read conjunctively, nevertheless there should be a purposive interpretation so as to give a fair, reasonable and just meaning to the provisions of that section in order to avoid a manifestly gross absurdity and a grave and obvious injustice. (*United Hokkien Cemeteries Penang v. Majlis Perbendaharaan Pulau Pinang* [1979] 2 MLJ 121, 123.

Counsel then referred to the mischief which the Legislature intended to correct or prevent and pointed out that prior to the passing of the Civil Law (Amendment) Act 1984, awards were given speculatively on future potential earnings. He cited the case of *Dr. S. Underwood v. Ong Ah Long* [1986] 2 MLJ 247 in which case a highly speculative award for loss of earnings was given and stated that was the obvious mischief intended to be rectified or remedied by the Legislature. He also referred to *Yang Salbiah & Anor. v. Jamil bin Harun* [1981] 1 MLJ 292 in which case an infant of 7 years was awarded RM33,816 for loss of future earnings when she was not employed at the time before her injury and was nowhere near the prospect of an employment. Reference was also made by Counsel to *Jamil bin Harun v. Yang Kamsiah & Anor.* [1984] 1 MLJ 217 and he pointed out that the case was decided just before the Civil Law (Amendment) Act came into force on 1 October 1984, and in that case Counsel for the appellant had submitted to their Lordships of the Privy Council that in the case of an infant plaintiff loss of future earnings was too speculative to qualify for an award of damages and that such loss should not, in Malaysian law, be accepted as recoverable; alternatively, that in that case there was no evidence of any such loss. Counsel in this case then submitted that the mischief intended to be avoided was awards such as those in the case of Yang Salbiah or those who were unemployed at the time of the accident. He contended, however, that it was never intended to extend the amended law to cases like that of the appellant in this case and pointed out that to include cases such as that of the appellant would be extremely unfair, unreasonable and unkind and would amount to gross absurdity in the law.

Here we must point out that the submission of Counsel for the appellant in the case of *Jamil b. Harun v. Yang Kamsiah & Anor.* (*supra*) that the former Federal Court was wrong to allow loss of future earnings into their assessment of the plaintiff's damages was rejected by the Privy Council which held that in the circumstances of that case the Federal Court had reached a reasonable estimate of the loss. In a judgment of the board delivered by Lord Scarman his Lordship said as follows:

> In *Tan Chwee Lian v. Lee Ban Soon* [1963] MLJ 149 the Court of Appeal of Singapore, in a case of a girl aged 9 years, awarded damages for loss of future earnings. The girl was "for all practical purposes, unemployable and her chances of marriage were virtually non-existent (p. 150).
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> In *Croke v. Wiseman* [1981] 3 All ER 852 the English Court of Appeal held (Lord Denning MR dissenting) that a gravely injured child of 21 months, who was expected to live for many years into adult life, was entitled to damages for loss of future earnings during his period of likely survival. Such loss was not to be treated as being so speculative that it could not be assessed. In the course of his judgment Griffiths LJ distinguished the case of a plaintiff who was expected to live from the "lost years" cases and made to comment, with which their Lordships wholly agree: he said (p. 862) that in the case of a gravely injured child "there are compelling special reasons why a sum of money should be awarded for his future loss of earnings". Shaw LJ, agreeing with Griffiths LJ, refused to accept that there should be any difference of principle between a child plaintiff and an adult plaintiff (p. 863). In effect, the Court of Appeal applied the principles enumerated by the House of Lords in *Lim Poh Choo's* case [1960] AC 174 which was one of an adult plaintiff, to the case of an infant plaintiff.

On the loss of earning capacity Counsel submitted that if the learned Judge was right in rejecting the appellant's claim for loss of future earnings, he ought to have considered and allowed a claim for loss of earnings capacity. He stated that on the agreed facts the appellant was somewhat a "vegetable" and could not resume her vocation. A claim for loss of earning capacity, he contended, was not expressly or impliedly excluded by the amendment of the Civil Law Act 1956, and should be allowed. He stated that if the Legislature intended to exclude that head of claim, such intention should have been clearly stated and in the absence of express exclusion the Court should not read into the amendment of the Civil Law Act 1956, such an implied exclusion. Counsel then contended that the medical reports which were agreed upon showed that the appellant would never be able to return to her work as a nurse. On the contrary she was almost an invalid and had to be nursed. She would be unable to return to her employment for which she was trained and qualified, and has lost her ability or capacity to work solely because of the accident and instead she would have to be nursed all her life. In support of the appellant's claim for loss of earning capacity Counsel cited *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ; *Jamil bin Harun v. Yang Kamsiah* (*supra*); *Tay Tong Chew & Anor. v. Abdul Rahman b. Haji Ahmad* [1985] 1 MLJ 30, 33; and *Sam Wan Hoon v. Kader Ibrahimshah* [1981] 1 MLJ 295.

Counsel for the respondents submitted that the first issue to be considered by the Court was the meaning of "future earnings" in s. 28A(2)(c). He also agreed with the view expressed by us in the Court that the previous distinction between pre-trial (past) and post-trial (future) loss of earnings is no longer applicable since the coming into force of the Civil Law (Amendment) Act 1984, on 1 October 1984.

Counsel then submitted that the next phrase to be considered in s. 28A(2)(c) should be "was receiving earnings". He pointed out that the Legislature has used the continuous tense and submitted that at the time when the appellant was injured she should be actually receiving earnings and that therefore the words "before he was injured" would mean immediately before the time of the injury.

It was then pointed out by Counsel that the word "prior" was used by the Legislature in s. 7(3)(iv) of the Civil Law Act 1956, relating to assessment of damages in fatal accident cases, but the word "before" was used in s. 28A(2)(c)(i) of the said Act. However, he contended that both words are synonymous and have the same meaning and that the Concise Oxford Dictionary defines the word "prior" to mean before. He pointed out that in the case of *Ong Hin Wah v. Dental Board Federation of Malaya* [1953] 19 MLJ 248 the Court was asked to give a ruling on the interpretation of the word "prior" in s. 5(1)(g) of the Registration of Dentists Ordinance 1948, as amended by Ordinance No. 33 of 1950, and it was held that the word "prior" means immediately preceding the date in question. Counsel also pointed out that in *Vandyk v. Minister of Pensions & National Insurance* [1954] 2 All ER 723, 729 Slade, J in the Queens Bench Division construed the words "gainfully occupied" in s. 1(2)(a) of the U.K. National Insurance Act 1946, to mean the period of a person's employment excluding the period during which he was abroad on no pay leave.

It was the further contention of Counsel for the respondents that para. (i) of s. 28A(2)(c) of the said Act should not be construed in isolation but must be read together or in conjunction with paras. (ii) & (iii) of the said sub-section. He pointed out that para. (ii) of s. 28A(2)(c) of the Act specifically provides that only the amount relating to the appellant's earnings "at the time when he was injured" be taken into account. It is also expressly provided that the Court should not take into account any prospect of the earnings being increased at some time in the future. It was the contention of Counsel that paras. (c) and (d) of s. 28A(2) of the Act should be given their ordinary meaning in so far as the victim's age, health, earnings and employment are concerned and that it was clearly the intention of the Legislature that the appellant must be actually receiving earnings at the time when he was injured. In this case the appellant was on no pay leave since the first day of November 1983, so her earnings at the time when she was injured was "nil". He contended that the Legislature has specifically prohibited the Court from taking into account the prospects that her pay which was nil at the time of her injury being increased to her former pay when she resumes working after her no pay leave.

As regards the question whether the appellant could raise the issue of loss of earnings capacity at the appeal stage, Counsel stated that the issue was not raised or argued in the trial Court. In the circumstances he urged us not to consider the issue as it is deemed to have been abandoned and it was incumbent on the appellant to tender a cogent explanation as to why the point was not raised or argued at all in the Court below. Counsel stated that an appellate Court would only exercise its discretion to allow such a new point or an abandoned point to be argued in exceptional circumstances as decided by the former Federal Court in the case of *Hoong Chin Wah v. Cheah Kum Swee & Anor*. [1967] 1 MLJ 163. It was his contention that in the instant case the aforesaid requirement has not been satisfied and he urged the Court to dismiss the appeal with costs.

As a reply to the submission of Counsel for the respondents, Counsel for the appellant in their written submission referred us to the U.K. Personal Injuries (Emergency Provisions) Act 1939, which by s. 8(1) defines a person gainfully occupied for the purpose of that Act as "a person who is engaged in any trade, business, profession, office, employment or vocation and is wholly or substantially dependent thereon for a livelihood, or a person who, though temporarily unemployed, is normally so engaged and dependent." But according to Slade J in *Vandyk's* case (*supra*) even in that case it is clear that for the purposes of that Act, the words "gainfully occupied" are in part dependent upon whether the receipts from the occupation are wholly or substantially the means of the person's livelihood. Therefore no

assistance can possibly be derived from the definition in that Act. However Counsel for the appellant stated that definition appears more akin and relevant to our purposes, but he concluded that unfortunately our Civil Law Act 1956 does not define the operative phrases.

We were also referred by Counsel for the appellant to s. 7(3) of the Civil Law Act where the word "prior" is used by the Legislature rather than the word "before" and were reminded that where in the same statute and in relation to the same subject matter, different words are used, there is a presumption that the alteration has been made intentionally. But here we must also remind ourselves that the presumption does not carry weight in relation to words used in different parts of a long and complicated statute, especially if it is a consolidating statute in which incongruous provisions are lumped together, or if it contains provisions which give rise to different consideration (*vide* para. 873 of Vol. 44, *Halsbury's Laws of England*, 4th Edn.). We were also referred to para. 867 of the said volume of *Halsbury's Laws of England* which state that words in a statute must be taken to be used correctly and exactly, and the onus of those who assert that they are used loosely or inexactly is a heavy one, and to para. 862 of the same volume of *Halsbury's Laws of England* where it is stated that there is a strong presumption that Parliament does not make mistakes. If blunders are found in legislation they must be corrected by the Legislature, and it is not the function of the Court to repair them.

It was also the contention of Counsel for the appellant that the words in s. 28A(2)(c) are clear, plain and unambiguous. But if the Court considered that the words are obscure or doubtful in their meaning, it should so construe them in order to avoid a manifest absurdity or injustice.

As stated above s. 28A(2)(c) of the Act should be construed as a whole. We notice that the Legislature has used the words "at the time when he was injured" after the words "fifty-five years or above". So when the Legislature used the word "before" in the same sub-paragraph (i) in para. (c) of that section we must assume that the Legislature had used that word "before" intentionally and we are in no position to say whether it is a case of an error on the part of the legal draftsman. But then in the same sub-paragraph (i) the Legislature has used the words "receiving earnings". Here we would agree with Counsel for the respondent that we must note that the Legislature has intentionally used the continuous tense. Then when we move to sub-paragraph (ii) we find that the Legislature has used the phrase "at the time when he was injured" after the words "only the amount relating to his earnings as aforesaid". It is then seen that the intention of the Legislature that in awarding damages for loss of future earnings, only the amount that the appellant was receiving at the time he was injured can be taken into account which means that if the appellant was not receiving any earnings at that point of time, she does not qualify for any award of damages for loss of future earnings. In this case as the appellant was on no pay leave and was not receiving any earnings at the time of the accident we must regretfully come to the conclusion that she is not entitled to any award of damages for loss of future earnings. We also regret that the order for a sum of RM55,880 awarded to the appellant as agreed loss of earnings from the date of the accident until the date of the trial should be cancelled. If it was the intention of the Legislature, bearing in mind the decision of the Privy Council in *Jamil bin Harun v. Yang Kamsiah & Anor.* (*supra*) as well as the decision of the U.K. Court of Appeal in *Croke v. Wiseman* (*supra*) that persons such as the appellant or children, students, and other adults temporarily not receiving earnings are not to be excluded then there would have to be a legislative amendment of the said section.

However, that was not the end of the matter as the appellant is entitled to be compensated for her loss of earning capacity. In this case there is evidence that she was earning RM1,270 per month and there is also evidence that after the accident she was practically a vegetable and would have to be nursed for the rest of her life. In other words she has suffered a total loss of earning capacity for the rest of her working life. We are now faced with the difficult task of assessing a fair and reasonable amount for the loss of earning capacity. It has to be borne in mind that damages for personal injuries are not punitive and still less a reward, but they are simply compensation that would give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate. (See *British Transport Commission v. Gourley* [1956] AC 185 and *H. West & Son Ltd. v. Shephard* [1963] 2 ALL ER 625. We have therefore to consider an award under general damages which would be commensurate with the injuries sustained but is not a full compensation which might result in ruinous consequences to the respondents. (Per Sir Alexander Cockburn LJ in *Phillips v. South Western Railway Co.* [1879] 4 QBD 406).

In this case the appellant has suffered total loss of earning capacity. Such loss in her case would last for the rest of her working life which is roughly another 30 years. Taking into account all past and future contingencies, the fact that the appellant was earning RM1,270 per month, her age at the time of the accident and the multiplier fixed by the Legislature in the case of loss of future earnings, we would assess the financial damage the appellant would suffer by first calculating her annual loss of earnings (1270 x 12) and arrived at the figure of RM15,240. We would then deduct 12 ½% or 1/8 of that sum for income tax which the appellant might have to pay. That of course would be speculative because we do not know if she would have to pay any income tax, and if so, how much. The appellant's nett annual income would be RM13,335. We would then round up that figure to RM13,000 and multiply it by 16 years purchase which works out to RM208,000. We were therefore of the view that an award of RM200,000 for loss of earning capacity in her case would be fair and adequate. That sum does not include the RM80,000 already awarded for pain and suffering which has been agreed upon by the parties. The appellant is therefore entitled to a total of RM280,000 as a fair and reasonable award under general damages together with interest thereon at the rate of 8 per cent per annum from the date of service of the writ to the date of payment. The amount awarded by the High Court for special damages plus interest at 4% per annum from the date of the accident to the date of judgment remains, and the appellant is also entitled to half the costs of this appeal.

Also found at [1990] 2 CLJ 167